when the debt was raised, or when it was actually considered by the decision maker? The AAT stated that it was consistent with *Lee* that:

> 'before an accrued right to have the decision reviewed arises by reference to the powers exercised, there must be a decision dealing with waiver, or a decision which should have dealt with waiver and omitted to do so.'

(Reasons, para. 56)

The AAT found that the issue of waiver was not considered until 15 July 1994 by the ARO. There were substantial amendments to the waiver provisions after this date. The amendment from 1 January 1996 applied to all debts outstanding at this date. Similarly the 1997 amendments applied to outstanding debts. Part of this debt was outstanding at both these dates. Therefore, the 1996 and the 1997 amendments applied to the consideration of waiver of this debt. In respect to that part of the debt which had been repaid prior to 1 January 1996, Nagieb had an accrued right to have this amount reviewed under the unamended Act. That is, was there administrative error? The AAT concluded that there was no administrative error in this case and nor were there any special circumstances. The debt was incurred because Nagieb and his wife made false statements to the DSS. Therefore, the debt should not be waived under either the unamended Act, nor under the later two amendments.

Formal decision

The AAT affirmed the decision under review

[C.H.]

Debt: differing pay periods, manner of calculation

NOLAN and SECRETARY TO THE DSS
(No. 12442)

Decided: 27 November 1997 by J. Handley.

Nolan was overpaid job search and newstart allowance during several periods in which she was also in receipt of salary and compensation. The SSAT had affirmed the decision made by an authorised review officer that the amount of the debt was $1822.41. Nolan disputed the manner in which the overpayment was calculated and the amount of the debt.

Differing pay periods of the employer and the DSS

One of the difficulties raised in calculating the amount of the debt was that the pay periods relating to employment did not coincide with the pay periods of the DSS. The AAT accepted that the DSS was entitled, inferentially, to conclude, despite the differing pay periods, that there was an overpayment. The pay periods were not so far apart as to prevent an interpretation or an inference from all surrounding facts that income received was less than actually declared (*Secretary to the DSS* v *Danielson* (1997) 2(7) *SSR* 103).The AAT also agreed that the DSS was entitled to calculate the rate of the overpayment by converting the amounts actually paid to Nolan each fortnight into average daily rates and then calculating the pension entitlement for the nearest corresponding DSS pay period by also converting those entitlements into average daily rates. There was little other alternative to this method of calculation.

Lump sum or arrears of fortnightly payments

Further, the AAT agreed with the manner in which the DSS dealt with a compensation payment paid to Nolan in a lump sum, but representing arrears and covering a prior period of five fortnights in which Nolan was incapacitated for work. Initially this sum had been treated by the DSS as income only for the fortnightly period in which it was actually received by Nolan. The DSS then recalculated the amount of the debt, and determined that the compensation was to be reapportioned as income over the five fortnightly periods during which the incapacity occurred, and for which the compensation payment was calculated and paid. The AAT concluded that the latter was the correct approach and that to treat the payment in any other manner would contravene s.1068-GA of the *Social Security Act 1991*.

The AAT's conclusions

The AAT was satisfied that for one of the periods in question there was a significant discrepancy in the amounts declared by Nolan as having been earned by her on her fortnightly continuation forms and the amounts actually earned. However, in relation to a further subsequent period, Nolan had declared the amount actually received by her in the previous fortnight from her employer, being the fortnightly period closest in time to the DSS fortnight. Although she did state that she was in receipt of Workcover, she had not distinguished between salary and compensation payments, but the fortnightly continuation forms had not asked her to do so. For these reasons the AAT remitted the matter back to the DSS for recalculation of the debt amount.

Formal decision

The decision under review was varied and the application was remitted to the DSS for recalculation of the amount of the overpayment, such sum to be repaid at $10 a fortnight from Nolan's ongoing benefits.

[A.T.]

Family payment: shared payments

HUME and SECRETARY TO THE DSS and PAULINE HUME (joined party)
(No. 121439)

Decided: 27 November 1997 by J. Handley.

Background

Hume, a non-custodial parent, applied for and was paid by the DSS a proportion of the family payment otherwise payable to his former partner in respect of their two children. For a period of time Hume was paid 28% of family payment. On internal review in 1996, that payment was cancelled. When Hume sought review by the SSAT, the cancellation decision was set aside. The SSAT substituted a decision that Hume be paid a proportion of 8% (despite finding that in terms of periods of access, Hume had the care and responsibility of the children of the marriage for 16% of the time each fortnight).

There was a break in the continuity of the access arrangements between November 1996 and March 1997, so the SSAT's decision in respect of the share of family payment was for a fixed period, commencing from when the cancellation had occurred in July 1996 and finishing in November 1996.

The legislation

The *Social Security Act 1991* (the Act), provides for family payment to be paid in respect of children who are family payment children of a person. In part, this

requires meeting the definition of 'dependent child' within s.5(2) of the Act:

> '. . . a young person who has not turned 16 is a dependent child of another person (in this section called the "adult") if:
>
> (a) the adult is legally responsible (whether alone or jointly with another person) for the day to day care, welfare and development of the young person, and the young person is in the adult's care; or
>
> (b) the young person is not a dependent child of someone else under paragraph (a); and is wholly or substantially in the adult's care.'

The Act provides in s.869(1) for the Secretary to the DSS to make a declaration in certain circumstances that family payment be shared between two persons, each qualified for family payment in their own right, and for the Secretary to specify in the declaration the share that each is to receive.

The issues

The AAT set out the following issues:

- whether the decision made by the SSAT to pay a share of family payment of 8% between July and November 1996 should be affirmed, varied or set aside; and
- whether family payment should resume being paid to Hume after March 1997 (when access resumed).

Sharing a rate of family payment

Initially after their separation, Hume and his ex-wife had arranged access to the children of the marriage by agreement between themselves, without the need for formal orders. In June 1996, a magistrate issued interim orders that set provision for fortnightly access, commencing Friday morning and ending Sunday evening. The interim orders were later confirmed by orders of the Family Court.

The evidence of Hume confirmed that access had occurred as per the orders until November 1996, when financial circumstances precluded Hume from having access to his children. Access resumed in March 1997 on the same basis as previously and essentially in compliance with the court orders. Hume's financial contribution was limited in the main to providing for the children during the time when they were with him, and petrol costs in picking them up from their mother. His claim for 16% of the family payment was based on the period of time in which he had access to the children in each fortnight. In that time, he argued he was the responsible parent. Mrs Hume's evidence confirmed the regularity of the periods of access.

The DSS submitted that despite departmental policy in shared family payment cases requiring that shared care and responsibility exceed 30% before the Secretary would apportion family payment between two people, neither the SSAT not the AAT was bound by such policy. However in circumstances where the Family Court Orders gave 'long term parental responsibility' to Mrs Hume, the AAT should apply the precedents set in the Federal Court, notably *Vidler v Secretary to the DSS* (1994) 36 ALD 720 and *Field v Secretary to the DSS* (1989) 52 *SSR* 694, and pay 100% of the family payment to Mrs Hume only.

The AAT decided that 100% of the family payment should be made to Mrs Hume, because of the operation of s.5(2), Mrs Hume being the 'adult' contemplated within s.5(2)(a).

The AAT further decided that a declaration under s.869(1) for sharing of family payment can only be made if two persons are each qualified for family payment in their own right. 'Considerable regard must be given to the Family Court Orders and the authority and expertise of that Court to make them': Reasons: para. 30. In so deciding, the AAT applied *Field* and *Vidler*. That being the case, it was unnecessary for the AAT to go on to consider the second issue, whether payment should resume in March 1997. There was no material change in the circumstances from the earlier period where the AAT had found no eligibility for a shared payment.

Formal decision

The AAT set aside the decision under review and found that Hume had no entitlement to a share of family payment for his children.

[M.C.]

Newstart allowance: unreasonable delay entering into a CMAA

SECRETARY TO THE DEETYA and BALDAM (No.12420)

Decided: 25 November 1997 by T.E. Barnett.

The DEETYA sought review of an SSAT decision that Baldam had not unreasonably delayed entering into a Case Management Activity Agreement (CMAA), and that therefore her newstart allowance should not have been cancelled under s.45(5) of the *Employment Services Act 1994* (ESA).

Background

Baldam had a lengthy history of difficulty in meeting her obligations in relation to case management, having been breached and had her newstart allowance cancelled on two previous occasions. The facts leading to the decision made by the DEETYA on this occasion, that Baldam had unreasonably delayed entering into a CMAA, involved her failure to attend a meeting with a newly appointed case manager in order to enter into a new CMAA. Baldam was sent two notices relating to the meeting date, but gave evidence that she did not receive either letter. Although she was staying with her mother at the relevant time, she had returned to her usual residence every few days to check her mail. Baldam also stated that she was prepared to enter into a new CMAA.

The DEETYA argued that Baldam was deemed to have received the letters sent to her in the ordinary course of the post under the *Acts Interpretation Act 1901*. She had not taken reasonable steps to ensure she received her mail, but should have had the mail redirected to her mother's home. Her failure to attend the meeting of which she was notified, in order to enter into a new CMAA, and her failure to contact her case manager to let him know she could not attend, constituted an unreasonable delay in entering into a CMAA. Therefore, she was not qualified for newstart allowance under s.45(5)(c) of the ESA. Further, as she failed to enter into a CMAA when required to do so under s.38, she did not qualify for the allowance under s.45(5)(a) of the ESA, nor was it payable under s.625 of the *Social Security Act 1991*. It was argued that Baldam's prior history should be taken into account by the AAT in making its decision.

The legislation

Section 45(5) of the ESA provides:

> 'The person is not qualified for . . . newstart allowance . . . in respect of a period unless . . .
>
> (a) when the person is required under section 38 to enter into a Case Management Activity Agreement in relation to the period the person enters into that agreement; and . . .
>
> (b) at all times during the period when the person is a party to the agreement, the person is prepared to enter into another such agreement instead of the existing agreement if required to do so under section 38.'

Section 625 of the *Social Security Act 1991* in turn provides that a newstart allowance is not payable if a person fails to enter into such an agreement.